

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
FOURTH REGION**

E&L CONSTRUCTION GROUP, INC.¹

Employer

and

Case 4–RC–21536

METROPOLITAN COUNCIL OF
CARPENTERS, SOUTHEASTERN
PENNSYLVANIA, STATE OF
DELAWARE AND EASTERN
SHORE OF MARYLAND

Petitioner

REGIONAL DIRECTOR’S DECISION AND ORDER

The Employer, E&L Construction Group, Inc., is engaged in commercial and industrial construction and construction management. The Petitioner, Metropolitan Council of Carpenters, filed a petition with the National Labor Relations Board under Section 9(c) of the National Labor Relations Act seeking to represent a unit of the Employer’s carpenters and apprentices.² The Employer contends that the petition should be dismissed because all of the carpentry employees covered by the petition are temporary employees who were only hired for a single job, and its carpentry work in the area will soon cease entirely. The Petitioner asserts that the Employer’s employees are not temporary employees and that the Employer may have work for these employees in the future.

A Hearing Officer of the Board held a hearing, and the Petitioner filed a brief. I have considered the evidence and the arguments presented by the parties and, as discussed below, I have concluded that the petition should be dismissed.

In this Decision, I will briefly review the relevant law governing the eligibility of temporary employees and imminent cessation of operations, especially with respect to

¹ The Employer’s name was amended at the hearing.

² Although not specified in the petition or at the hearing, the petition presumably only seeks a unit of employees within the Petitioner’s geographical jurisdiction, which covers the state of Delaware, the eastern shore of Maryland, and various counties in southeastern Pennsylvania.

construction industry employees. Then I will set forth the facts adduced at the hearing and present the reasoning that supports my conclusion.

I. RELEVANT CASE LAW

Temporary Employees

Temporary employees are ineligible to vote, and their eligibility is determined based on their status as of the payroll eligibility date. *WDAF Fox 4*, 328 NLRB 3 (1999), *enfd.* 232 F.3d 943 (8th Cir. 2000). A finding of temporary employee status does not necessarily require that the employee's tenure is certain to expire on an exact calendar date; it is only necessary that the prospect of termination is sufficiently finite on the eligibility date to dispel reasonable contemplation of continued employment beyond the term for which the employee was hired. *MJM Studios of New York, Inc.*, 336 NLRB 1255, 1257 (2001); *St. Thomas-St. John Cable TV*, 309 NLRB 712, 713 (1992). When termination dates are not immutable, and the employer considers the purported temporary employee for a permanent position, there is no "date certain" for termination. *WDAF Fox 4*, above.

Imminent Cessation of Operations

The Board will not conduct an election where the employer's closing of its business operations is imminent and certain. *Hughes Aircraft Co.*, 308 NLRB 82, 83 (1992); *Larson Plywood Co.*, 223 NLRB 1161 (1976); *Martin Marietta Aluminum, Inc.*, 214 NLRB 646, 647 (1974). However, where the likelihood that the employer's operations will cease is too speculative to warrant withholding from the employees their statutory right to choose or reject union representation, the Board will direct an election. *Hazard Express, Inc.*, 324 NLRB 989, 990 (1997); *Canterbury of Puerto Rico, Inc.*, 225 NLRB 309 (1976). Factors considered in determining whether the cessation of operations is sufficiently imminent and certain to warrant dismissal of the petition include the period of time between the representation hearing and the expected date of cessation, steps taken by the employer to cease operations, and whether the employees have been notified. See *Hughes Aircraft Co.*, above at 82-83; *Larson Plywood Co.*, above.

Construction Industry Employers

In the construction industry, application of the *Daniel/Steiny* formula for determining employee voting eligibility, "necessarily includes those who would be temporary because of the intermittent nature of the construction industry and the fact that employees may work for more than one employer." *Turner Industries Group, LLC*, 349 NLRB 428, 434 (2007). See *Daniel Construction Co.*, 133 NLRB 264 (1961), modified at 167 NLRB 1078 (1967), reaffirmed and further modified in *Steiny and Company, Inc.*, 308 NLRB 1323 (1992). However, no eligibility formula should be applied and a petition should be dismissed when a construction employer is concluding a particular project and has no successful bid or committed work for the immediate future within the unit sought by the petitioner. *Steiny and Co.*, above at 1328, n. 17; *Davey McKee Corp.*, 308 NLRB 839, 840 (1992); *M.B. Kahn Construction Co.*, 210 NLRB 1050

(1974). In such circumstances, the Board has stated that if the petitioned-for unit remains in existence for a substantially longer period of time than anticipated or the employer acquires additional construction projects within the geographical scope of the petitioned-for unit, the Board will entertain a motion by the petitioner to reinstate the petition. *Davey McKee Corp.*, above. The Board will proceed to an election notwithstanding the completion of a particular project, however, when the employer is bidding on work within the unit sought by the petitioner and has previously performed such work. *Fish Engineering & Construction Partners, Ltd.*, 308 NLRB 836 (1992).

II. FACTS

Background

The Employer operates mainly in Michigan where it employs anywhere from 10 to 100 construction employees at a time, including carpenters, laborers, masons, and equipment operators. Approximately two years ago, the Employer obtained a contract with General Motors for construction management work in the Delaware area and set up an office in Newark, Delaware to perform this work and obtain other work in the vicinity.

John Wright, a Director for the Employer, is the Employer's only permanent employee in the Delaware area. He is responsible for running the Newark office and estimating, bidding on, and managing projects. When the Employer has a General Motors project, Bill Daeschlein, a superintendent from Michigan, comes to Delaware to manage it, but at present there are no such projects.

The Lancashire Elementary School Job

The Employer has only one current project in the Delaware area, performing rough carpentry work for the construction of the Lancashire Elementary School. According to Wright, although the Employer initially planned to subcontract the work, he filled out the bid form for the job incorrectly, listing the Employer as the direct provider of the work, which led to the Employer hiring employees directly to "self-perform" instead of subcontracting.

In late December 2008, Wright sought employees from the Craigslist website to perform the Employer's work on this project. He hired a foreman, John Nelson, who then recommended four other carpentry employees who were hired between mid-December 2008 and mid-to-late January 2009. In mid-January, Nelson was replaced as foreman by Doug Lucas, and Lucas recommended hiring several new employees to replace some of the existing ones. In total, the Employer has used 13 employees on the job, up to seven at a time, each of whom worked from a day-and-a-half to about 30 days.

Shortly before the hearing, Lucas left the Employer's employ for medical reasons, and employee Nick Perez became the Acting Foreman. On March 5, the day before the hearing, five of the Employer's seven employees were laid off. After the layoff, Perez and the other remaining employee were expected to perform approximately eight more weeks of work to be

completed by the end of April 2009.³ The Employer does not anticipate performing any other carpentry work on the project until October, when it expects to conclude its work by installing doors and hardware for approximately three weeks with two or three employees.

The Employer's Future Plans

Wright testified that the Employer does not plan to self-perform any carpentry work in the Delaware area after completing the Lancashire school job. The Employer has no other outstanding bids for work in the area and is currently preparing only one such bid, for a project in Denton, Maryland, where it would subcontract the work if its bid were accepted. Wright testified that the Employer plans to function as a construction manager for future work, not as a general contractor that would self-perform some work.

Prior to the Lancashire job, the Employer did not self-perform any carpentry during its two years in the area. The Employer self-performed some laborer work for General Motors three times using one employee referred by a Laborers local union each time. The Employer's agreement with General Motors did not require self-performance of this work, but the Employer chose to do it in order to save money for General Motors.

The Employer bid on approximately 12 projects in Delaware and 12 in Pennsylvania which may have included some self-performance. However, the Employer did not receive any of this work.

Several employee witnesses testified that the Employer did not inform them when they were hired for the Lancashire project that the job was temporary. During their tenure of employment, Wright told them that the Employer was bidding on projects, which led them to conclude they might get further work. Nelson testified that he inquired at his job interview about whether he had a future with the company, and Wright answered that he might be employed on future jobs as a superintendent. Perez testified that in late February, Wright told him that he liked Perez' work and that he was likely to continue on the project until it was complete and that he would be interested in using him on another job. The record was not clear as to whether Wright wanted to use him as a superintendent or employee in the future. Two employees who were laid off the day before the hearing testified that they were told that they could contact the foreman the following week as to their status. Further, a job applicant testified that three days before the hearing, Wright informed him that the Employer was not hiring but that he could check back in the summer.

The Petitioner's Director of Organizing testified that in his experience, general contractors regularly employ carpenters to self-perform some work including weather protection work and completing the "punch list."

³ All dates are in 2009 unless otherwise indicated.

III. ANALYSIS

The Petitioner contends that the carpenters hired by the Employer for the Lancashire school project were not temporary employees because their tenure was indefinite. In this connection, the Petitioner disputes the Employer's assertion that these employees were employed for only one job and have no expectation of continued employment with this Employer. Rather, the Petitioner asserts that the Employer will continue to operate through April and then again for several weeks in October and has not convincingly demonstrated that it will not seek future work requiring self-performance by carpenters. The Petitioner notes that the Employer has previously bid on numerous jobs and is continuing to bid on additional jobs, and asserts that the Employer may decide to self-perform future projects for General Motors.

The record is clear that the Employer plans to complete the current phase of work with two employees by the end of April, approximately eight weeks after the hearing, and has no further carpentry work on the job until October when it will use two or three employees for approximately three weeks. Thus, the Employer has approximately 11 weeks remaining on this job, albeit spread out until October. The Employer has not self-performed any other carpentry work in the area. Moreover, the Employer is not currently bidding on any other carpentry work to self-perform and has stated its intention not to do so. Five of the Employer's seven employees were laid off before the hearing, and the two remaining employees are aware of the limited extent and time frame for the remaining carpentry on the job.

The Board has dismissed petitions in analogous circumstances. The Board dismissed the petition in *M.B. Kahn Construction Co.*, above, where the employer had approximately six consecutive months of work remaining on a project and did not contemplate having any future projects in the area, finding, in view of the imminent completion of the project, that no useful purpose would be served by conducting an election. Likewise, in *Davey McKee Corp.*, above, the Board dismissed the petition where the employer expected its remaining ongoing projects to be completed in a month, and the employer had no other work under bid in the area. In contrast, in *Fish Engineering*, above, the Board found that an election should be conducted where the employer had worked on four projects in the area in the past year and, unlike the Employer in this case, had bid on future work similar to the work it was already performing.

Employee testimony indicates that the Employer has suggested to several employees that there might be future work, and the record evidence shows that the Employer has in the past bid on some jobs that may have involved some self-performing. However, these facts are insufficient to outweigh the significant evidence that the Employer will not be self-performing carpentry work in the area after the Lancashire project is completed. Under these circumstances, there is no useful purpose to be served in conducting an election, and I am therefore dismissing the petition. *Davey McKee Corp.*, above; *M.B. Kahn Construction Co.*, above.⁴

⁴ This Decision and Order is issued without prejudice to the Petitioner's right to file a motion to reinstate the instant petition should the Employer resume self-performing carpentry work.

IV. CONCLUSIONS

Based upon the entire record in this matter and in accordance with the discussion above, I conclude and find as follows:

1. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.

3. The Petitioner is a labor organization that claims to represent certain employees of the Employer.

4. No question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act, and the petition is therefore dismissed.

V. ORDER

IT IS HEREBY ORDERED that the petition be, and it hereby is, dismissed.

VI. RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, NW, Washington, D.C. 20570-0001. A request for review may also be submitted by e-mail. For details on how to file a request for review by e-mail, see www.nlr.gov and click on E.gov. The request for review must be received by the Board in Washington by 5:00 p.m., EDT on **April 15, 2009**.

Signed: April 1, 2009

at Philadelphia, PA

/s/ [Dorothy L. Moore-Duncan]
DOROTHY L. MOORE-DUNCAN
Regional Director, Region Four
National Labor Relations Board